IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE E. FELDMAN, d/b/a LAWRENCE E. FELDMAN and ASSOCIATES,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

Civil Action No. 06-cv-2540

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GOOGLE, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant Google, Inc. ("Google") submits the following Memorandum in support of its Opposition to Plaintiff Lawrence E. Feldman's Motion for Summary Judgment.

I. INTRODUCTION

Forum-selection clauses must be enforced unless "trial in the contractual forum will be so gravely difficult and inconvenient that the party seeking the non-contractual forum will for all practical purposes be deprived of his day in court." *Anastasi Bros. Corp. v. St. Paul Fire and Marine Ins. Co.*, 519 F. Supp. 862, 863 (E.D.Pa. 1981) (Giles, J.), *quoting M/S Bremen v. Zapata OffShore Co.*, 407 U.S. 1, 18 (1972). Plaintiff Lawrence Feldman—an attorney who, on his website, touts himself as "a pioneer in computer law, internet law, consumer class actions, . . . entertainment law" and other subjects—alleges that he signed a contract with Google that requires all disputes to be litigated in Santa Clara County, California. This clause is valid and enforceable and, under *Anastasi Bros.* and other authority, it requires that this action be dismissed so that Feldman can proceed in the agreed forum. Google's pending motion to dismiss, filed on August 28, 2006, asks the Court to order this relief.

Dockets.Justia.com

To try to forestall the result that the contract requires, however, Feldman has thrown up two procedural roadblocks. First, he filed an amended complaint that asserts a claim for breach of *implied* contract—rather than breach of contract, as his original, verified complaint did—and argued that, because he pled non-contractual claims in his second pleading, the Court may ignore the forum-selection clause that the parties agreed to. *See* Plaintiff's Resp. to Defendant's Supp. Memorandum in Support of Mot. to Dismiss Am. Compl. ["Pl. Response"] at 1-2. This ploy, however, cannot overcome a contractual forum-selection clause. *Crescent Intern., Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944-45 (3d Cir. 1988) (applying a forum-selection clause to a complaint that pled only tort claims, and noting that, if it did not do so, a litigant could avoid "a forum selection clause by simply pleading non-contractual claims."); *DeJohn v. The .TV Corporation Int'l*, 245 F.Supp.2d 913, 918 (N.D. Ill 2003) (holding, under facts similar to those in this case, that the plaintiff cannot proceed under an implied-contract theory because an enforceable contract governs the parties' relationship).

Second, Feldman has now moved for "summary judgment" that the contract he agreed to with Google is unenforceable, relying on the supposed unfairness of several terms other than the forum-selection clause, and the fact that he did not negotiate the contract before he accepted it. This argument fails as well. Feldman can demonstrate neither procedural nor substantive unconscionability, though he must prove both to prevail. Moreover, even if he could somehow demonstrate that a provision of the contract was unenforceable, the contract contains a severability clause under which unenforceable terms may be modified or stricken. The forum-selection clause would still remain in force.

Feldman is a sophisticated attorney who, according to his website, litigates cases across the country, including "recently serv[ing] as lead counsel in . . . Novacheck v. CIGNA (C.D. Cal. 95-3566)," a case pending in Los Angeles. He alleges that he chose to advertise with Google, and agreed to litigate any disputes in California. The Court should now enforce the contract's forum-selection clause.

II. PROCEDURAL BACKGROUND

Feldman filed his original complaint in this action in the Court of Common Pleas on March 9, 2006. That complaint, which Feldman verified under penalty of perjury, alleges that he entered into a contract with Google, and attaches a copy of the contract. The contract contains a forum-selection clause that requires disputes to be litigated in Santa Clara County, California. *See* Complaint Ex. A at ¶ 7.

Google removed the action to this Court on diversity grounds. It then moved to dismiss due to the forum-selection clause.[1] The Court held a hearing on November 1, 2006, and requested additional information, including whether Feldman had been shown the contract before, or after, he purchased advertising on Google. On November 16, Google submitted the Affidavit of Annie Hsu, which explains that advertisers are shown the contract before they purchase any advertising, and moreover, that they must accept the contract by clicking "**Yes,** I agree to the above terms and conditions" before they purchase any advertising. The Affidavit also explains that Google takes various steps to ensure that the contract is short and easy to read.[2]

Meanwhile, in an effort to bypass the forum-selection clause, Feldman filed an amended complaint. The amended complaint omits the breach-of-contract claim that Feldman pled in his original verified complaint, and replaces it with a claim for breach of *implied* contract. Thereafter, Feldman filed his motion requesting "summary judgment" that the contract is unenforceable due to the "take it or leave it" nature of the contract, and the supposed unfairness of various terms other than the forum-selection clause.

---

[1] A copy of Google's Memorandum of Law in support of its motion to dismiss the amended complaint is attached hereto as Exhibit A.

[2] A copy of Ms. Hsu's Affidavit is attached hereto as Exhibit B.

III. ARGUMENT

A. Feldman has failed to show that the contract is unenforceable.

Since the forum-selection clause itself is plainly enforceable, Feldman now argues that the *entire* contract should be held unenforceable. Motion for Summary Judgment at 2. Thus, he asserts that the forum selection clause is void by virtue of its inclusion in a "take it or leave it" contract, which he contends is necessarily unconscionable. But courts routinely enforce standardized form contracts—indeed, they must do so, given the prevalence and importance of such contracts.[3] Moreover, if in fact any provisions of the contract were unenforceable (which they are not), they could be modified or severed under the contract's severability clause. Whether any such modification or severance should occur is a matter to be decided by the court in the parties' agreed forum, after dismissal of the action in this forum.

1. Feldman has established neither the procedural nor substantive elements necessary to find the Adwords Agreement unconscionable.

In order to render a contract unconscionable, a litigant must show "the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 767 (1989); *Hornberger v. General Motors Corp.*, 929 F. Supp. 884 (E.D. Pa. 1996). In other words, courts require a showing of *both* procedural and substantive unconscionability. *See Koehl v. Verios, Inc.*, 142 Cal. App. 4th 1313, 1339 (2006); *Ostroff v. Alterra Heathcare* Corp., 433 F. Supp. 2d 538, 542 (E.D. Pa. 2006). The party challenging the contractual provision has the burden of proving unconscionability. *See Crippen v. Cent. Valley RV Outlet, Inc.*, 124 Cal. App. 4th 1159, 1165 (2004). Feldman has failed to establish either element.

---

[3] For decades, courts have recognized that "[m]ost contracts which govern our daily lives are of a standardized character. We travel under standard terms, by rail, ship, aeroplane, or tramway. We make contracts for life or accident assurances under standardized conditions. We rent houses or rooms under similarly controlled terms; authors or broadcasters, whether dealing with public or private institutions, sign standard agreements; government departments regulate the conditions of purchases by standard conditions." *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694 (1961) (internal quotation marks omitted).

a. The contract is not procedurally unconscionable.

For the procedural element of unconsionability, California courts focus on: (1) "oppression," which refers to an inequality of bargaining power resulting in no real negotiation and the absence of meaningful choice; and (2) "surprise," which occurs when supposedly agreed-upon terms of the bargain are hidden. *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 767 (1989).[4] Courts routinely consider numerous other relevant factors, including the buyer's sophistication, whether negotiation was attempted, the use of high-pressure tactics or external pressure to induce acceptance, as well as the availability of alternative sources of supply from which to obtain desired goods and services. *See, e.g., id.*, at 767-69; *Dabney v. Option One Mortg. Corp.*, 2001 WL 410543, at *4 (E.D. Pa. Apr. 19, 2001); *DeJohn v. The .TV Corporation Int'l*, 245 F.Supp.2d 913, 919 (N.D. Ill 2003); *Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 451-52 (E.D.N.Y. 2004).

Thus, although the ability to negotiate is pertinent to the issue of procedural unconscionability, the analysis only begins—and by no means ends—with an inquiry into negotiability. *See Koehl v. Verio, Inc.* 142 Cal. App. 4th 1313, 1339 (2006); *see also, Rosenfeld v. Port Authority of New York and New Jersey*, 108 F. Supp. 2d 156, 164 (E.D.N.Y. 2000) (An "agreement cannot be considered procedurally unconscionable, or a contract of adhesions, simply because it is a form contract."); *Dabney v. Option One Mortg. Corp.*, 2001 WL 410543, at *4 (E.D. Pa. Apr. 19, 2001) (finding that "take it or leave it" arbitration agreement was not procedurally unconscionable where homeowner had sufficient disclosure of information, failed to submit evidence that she attempted to negotiate standardized terms, and had alternative sources for financing services.); *DeJohn v. The .TV Corporation Int'l*, 245 F.Supp.2d 913, 919 (N.D. Ill 2003) (finding online domain registration agreement was not unconscionable contract of adhesion where purchaser clicked the box stating that he had read, understood, and agreed to express terms, and had the option of retaining domain registration services elsewhere).

[4] The contract states that it is to be governed by California law. *See* Complaint, Ex. A at ¶ 7. Pennsylvania law is similar to California's, also requiring an "absence of meaningful choice on the part of one of the parties." *Ostroff*, 433 F. Supp. 2d at 538.

For this reason, this Court and others have routinely enforced contracts that were not negotiated. *See, e.g.*, *Travelers Indemnity Company v. Centlivre*, 1992 WL 163321, at *5 (E.D.Pa. July 7, 1992) (Giles, J.) (upholding a forum-selection clause in a form bond agreement that was not the subject of specific bargaining, citing *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 592 (1992)).

Here, every factor militates against a finding of procedural unconscionability. First, Plaintiff does not allege any "surprise" from hidden or undisclosed terms; it is undisputed that the Adwords agreement was a short seven paragraph (three page) document, drafted in plain, unmistakable English and in normal 12-point type. Second, Plaintiff is a sophisticated purchaser. He is an attorney who touts himself as a pioneer in numerous areas, including computer law, internet law, and consumer class actions,[5] and is fully capable of understanding the plain language terms of the AdWords agreement. Third, Feldman does not allege, nor could he, that he was under any high-pressure tactics or external pressure to accept the agreement.

Finally, there are ample alternative sources for advertising services, including similar online search-related advertising offered by Google's many competitors, such as MSN Search, AOL Search, Ask.com, Yahoo!, Excite, Infospace, and HotBot, just to name a few. Moreover, Feldman could have promoted his legal services by means other than on-line advertisements. The existence of these reasonably available market alternatives "tends to defeat any claim of unconscionability" as the buyer retains a "'meaningful choice' to do business elsewhere." *Dean Witter Reynolds, Inc.*, 211 Cal. App. 3d at 768-71 (holding that a termination fee charged by financial services provider was not unconscionable as to sophisticated investor-attorney where attorney failed to show lack of competitor services free from the allegedly unconscionable fee); *see also Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606, 614 (1988) (exculpatory clause in contract for use of motorcycle park not unconscionable where plaintiff presented no evidence that he could not have ridden his motorcycle elsewhere). Courts in this district have recognized the same principle, and affirmed that a standardized, non-negotiable contract may be improperly

[5] http://www.leflaw.com/ ("Since 1982, Lawrence E. Feldman & Associates has been a pioneer in computer law, internet law, consumer class actions, mass torts, civil rights, copyright and trademark, entertainment law and related areas.")

adhesive only "under such conditions that [the] consumer cannot obtain [the] desired product or services except by acquiescing [to the] form contract." *Dabney v. Option One Mortg. Corp.*, 2001 WL 410543, at *4 (E.D. Pa. Apr. 19, 2001) (citations omitted). *See also Denlinger, Inc. v. Dendler*, 608 A.2d 1061, 1068 (Pa. Super. 1992) (where seller was not exclusive supplier of rare or much-sought-after goods, buyer retained meaningful choice to seek supplies elsewhere); *Vasilis v. Bell of Pennsylvania*, 598 A.2d 52, 54 (Pa. Super 1991); (reiterating that where "a contract provision affects commercial entities with meaningful choices at their disposal, the clause in question will rarely be deemed unconscionable.").

In sum, Feldman is a sophisticated and knowledgeable buyer, who presents no evidence that any terms were surprising or that he faced any high-pressure tactics to accept the Adwords agreement. Moreover, as in the cited cases, if Feldman found terms of the Adwords agreement unacceptable, he retained the meaningful choice to reject the contract and expend his advertising dollars on a multitude of similar web-based advertising services or other services. Feldman has failed to demonstrate procedural unconscionability.

b. There is no substantive unconscionability.

Because the Plaintiff failed to satisfy the procedural element, this Court need not reach the second prong of the inquiry concerning the substantive element. Nevertheless, consideration of Plaintiff's arguments for substantive unconscionability reveal that they are meritless too.

The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create "overly harsh" or "one-sided" results so as to "shock the conscience." *Aron v. U-Haul Co. of California*, 143 Cal. App. 4th 796, 808 (2006) (citations omitted); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) ("Substantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent."). None of the provisions highlighted by Plaintiff in his Motion approach these high standards.

First, Plaintiff contends that the forum selection clause unreasonably favors Google insofar as it requires that billing disputes be adjudicated in California. Motion for Summary Judgment at 5. Such reasoning, if adopted, would effectively invalidate all forum selection clauses, and plainly contradicts settled Supreme Court jurisprudence. In enforcing a standardized, non-negotiable forum selection clause, the Supreme Court held that a cruise line has a special interest in limiting fora in which it potentially could be subject to suit, particularly because it operates in many locales and thus could be subject to suit in many different locations. *Carnival Cruise Lines, Inc*. 499 U.S. at 593-94. The forum selection clause also served to dispel confusion about where suits may be brought, sparing litigation costs and judicial resources associated with the inevitable flurry of jurisdictional motions. *Id*. Finally, the Supreme Court added that purchasers likely benefited by reduced fares, which would reflect savings the cruise line enjoys by limiting the fora in which it may be sued, *id*., a point which this Court has reiterated in repeatedly upholding forum selection clauses. *See Anastasi Brothers Corp. v. St. Paul Fire and Marine Ins. Co.*, 519 F. Supp. 862, 863-4 (E.D. Pa. 1981) (Giles, J.); *Travelers Indemnity Company v. Centlivre*, 1992 WL 163321, at *5 (E.D. Pa. July 7, 1992) (Giles, J.). Such factors apply with even great force to Google's Adwords advertising services, which are offered to many thousands of customers located all over the world.[6]

Plaintiff next contends that "based on the evidence submitted [in Google's pleadings], "this Court cannot say with certainty that the [Adwords agreement] was not one of adhesion." Motion for Summary Judgment at 5. Not only is this unexplained assertion inaccurate (as addressed above), it misuses the standard employed for a motion for summary judgment and also wrongfully shifts the burden for proving unconscionability, which remains on the Plaintiff. Moreover, it refers to factors associated with procedural unconscionability, which are irrelevant to this substantive element inquiry.

Next, Feldman contends that certain other provisions in the contract are substantively unconscionable. For the sake of completeness, Google addresses each of these provisions below. Google emphasizes, however, that these matters should appropriately be decided by the court in the parties' agreed forum. This Court need not and should not address these other provisions

[6] Plaintiff's assertion of undue burden due to health-related travel restrictions are, as a matter of law, irrelevant to the issue of unconscionability, which focuses on the unfairness of the actual terms of the agreements at the time the contract was entered into. *See Aron v. U-Haul Co. of California*, 143 Cal. App. 4th at 808. Google addresses these concerns below.

before granting Google's motion to dismiss.

First, Feldman contends that a 60-day window within which to dispute charges is unconscionable. Motion for Summary Judgment at 5-6. This contention fails. It is well established that contractual limitations periods are valid so long as the period for bringing claims is reasonable. *See Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 608 (1947); *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877 (9th Cir. 1995) ("California permits contracting parties to agree upon a shorter limitations period for bringing an action than prescribed by statute, so long as the time allowed is reasonable."). And California courts have frequently upheld contractual limitations period of similar length. *See, e.g.*, *Levitsky v. Farmers Ins. Group of Companies*, 2002 WL 1278071, at *4, (Cal. App. 1 Dist., 2002) (finding that a 60-day limitation within which to file medical bills or claims is not unconscionable); *Pacific Coast Co. v. Yukon Independent Transp. Co.*, 155 F. 29 (9th Cir. 1907) (upholding requiring claims within 60 days after notice of damage or loss); *Capehart v. Heady*, 206 Cal. App. 2d 386 (1962) (concluding that three-month limitation period in lease was not unreasonable); *Ward v. System Auto etc. Garages, Inc.*, 149 Cal.App.2d Supp. 879, 880-81 (1957), disapproved on other grounds in *California State Auto. Assn. Inter-Ins. Bureau v. Barrett Garages, Inc.*, 257 Cal. App. 2d 71, 78-79 (1967)) (upholding 90-day limitation for claims arising out of bailment contracts).

Google's 60-day window is reasonable, striking the appropriate balance between the customer's ability to identify and report any billing errors and Google's ability to manage the enormous amounts of data and transactions associated with its Adwords services. Customers are afforded two full months to review bills for any irregularities. And the two-month window allows Google to reasonably limit the amount of resources it must devote to record, process, and manage each of many millions of clicks, as well as the many thousands of customer accounts affected by them. There is no basis to strike this provision.[7]

---

[7] Again, Plaintiff's cases are easily distinguished. *Anthony v. Alexander Int'l, L.P.*, 341 F.3d 256, 266 (3d Cir. 2003) considered only a 30-day window to raise *any* claim arising out of a full employment agreement. Google's window is twice as long and covers only certain specified disputes. *See* Agreement ¶ 5 (waiving only "claims related to charges"). *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002), considered a contractual limitation to state Fair Employment and Housing Act claims that would serve to deprive plaintiffs of the "continuing violation" doctrine, a judicially-created doctrine deemed necessary in light of the evidentiary

Next, Feldman protests a series of provisions from the Adwords agreement, including a warranty disclaimer and the exercise of Google's discretion in offering refunds. Motion for Summary Judgment at 6. Feldman cites no case law supporting his contention that these provisions are substantively unconscionable, nor could he, since they are entirely reasonable. Nothing about these commonplace terms "shocks the conscience," as required under California law.[8]

2. Even if a particular provision were unenforceable, the severability clause provides that the remaining provisions remain in full force.

As set forth above, Feldman has failed to establish the procedural or substantive elements of unconscionability of any of the contractual provisions. But even if he had done so, the contract contains a severability clause which provides that any unenforceable clause will be modified or severed. *See* Complaint Ex. A (Contract) at ¶ 7 ("Unenforceable provisions will be modified to reflect the parties' intention, and remaining provisions of the Agreement will remain in full effect."). Thus, even if Feldman's challenges to the various terms other than the forum-selection clause had merit (which they do not), Google's motion to dismiss still should be granted.

---

complexity of discrimination cases. *See Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 812-18 (2001). The Adwords limitation effect only billing disputes, not discrimination claims, and does not seek to roll-back judicially-created doctrines.

[8] For these reasons, courts have consistently upheld Google's contracts, including their forum-selection clause. For example, in *Person v. Google, Inc.*, F. Supp. 2d, 2006 WL 2884444 (S.D.N.Y., October 11, 2006), the Southern District of New York considered the same AdWords contract that is at issue here. The court held that the forum-selection clause in the contract is fundamentally fair, and accordingly, ordered the case to be transferred from New York to San Jose, California, which is in Santa Clara County, the forum that the contract specifies. *Id.* at *3-*8. Likewise, in *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446 (E.D.N.Y. 2004), the court considered Google's contract for Google Groups, an on-line discussion group service, which is presented to the user in a manner similar to how the AdWords contract is presented to advertisers. *See id.* at 451. The court held that the forum-selection clause in the contract is valid and enforceable, and dismissed the relevant claims without prejudice to be renewed in an appropriate venue. *Id.* at 451-52. In contrast, *no* court has held that the AdWords or Google Groups contract is unenforceable, as Feldman asks this court to do.

B. Feldman's non-contractual claims are subject to the forum-selection clause.

In an alternative attempt to circumvent the contractual forum-selection clause, Feldman amended his verified complaint, replacing his legal breach-of-contract claim with one for breach of *implied* contract. Under well settled law, this tactic fails

In *DeJohn v. The .TV Corporation Int'l*, 245 F.Supp.2d 913, 918 (N.D. Ill 2003), the court rejected the same argument under surprisingly similar circumstances. In opposing a motion to dismiss for improper venue based on a forum selection clause, the plaintiff, who had agreed to an online domain-registration contract with Register.com, sought to avoid dismissal by arguing that the "take it or leave it" online agreement was an unconscionable adhesion contract. Thus, the plaintiff contended that their relationship was governed by an implied contract. The *DeJohn* court rejected the attempt to circumvent the contract's express terms, recognizing that "the existence of an enforceable contract governing a particular transaction precludes recovery under an implied contract related to the same transaction." *See DeJohn v. The .TV Corporation Int'l*, 245 F.Supp.2d at 918. Similarly, here, Feldman alleges under penalty of perjury that on or about January 2003, he agreed to be bound by an express Adwords agreement. This precludes any implied contract.

Indeed, it is well settled under California law and in the Third Circuit that a litigant cannot circumvent a forum-selection clause by pleading alternate non-contractual claims if those claims arise out of the contractual relation and implicate the contract's terms. *Crescent Intern., Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944-45 (3d Cir. 1988) (applying forum selection clause to claims of RICO violations, fraud, unfair competition and tortious interference); *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 497 (1976) (holding that unfair competition and intentional business interference arose out of contractual relationship and thus were subject to contracts forum selection clause). As the Third Circuit recognized in *Crescent*, if the ploy that Feldman has attempted here were effective, a litigant could avoid "a forum selection clause by simply pleading non-contractual claims." 857 F.2d at 944-45.

Here, all of Feldman's claims arise out of his alleged purchase of AdWords advertising from Google, which is governed by the contractual relationship. Thus, all these claims fall under the forum-selection clause, whether or not they are couched in the language of the contract.

C. Feldman's health considerations do not preclude litigation in the parties' agreed forum.

Feldman also argues that the Court should not enforce the contractual forum-selection clause because his health is impaired and his ability to travel is currently restricted. While Google will of course make appropriate accommodations for legitimate health concerns, this is not a basis to deny enforcement of the forum-selection clause.

First, it should be noted that, by his own account, Feldman still maintains a thriving law practice. His website, www.leflaw.com, states that he currently represents clients in matters pending in Georgia, Delaware, Maine, and other venues; that he serves as co-counsel in a class action pending in San Diego, California (*Hapner v. Sony Electronics, Inc.*, Case No. GIC839244); and that he "recently served as lead counsel" in a case pending in federal court in Los Angeles. Obviously, his firm should bring no fewer resources to bear in this case than it does in its other matters.

Second, Feldman will not be required to travel to California if his health will not permit it. His firm has been represented in this Court by another one of its attorneys, and it may continue to do so in the California court. Attorneys also may appear telephonically. Any discovery involving Mr. Feldman, such as his deposition, could occur near his home, in a manner that accommodates any existing health restrictions. And if this matter proceeds to trial, appropriate accommodations could be made to take Mr. Feldman's testimony if any health-related travel restrictions still exist. In short, none of Feldman's concerns warrants denying enforcement of the contract's forum-selection clause. *See, e.g., Ferketich v. Carnival Cruise Lines*, 2002 WL 31371977 at 6 (E.D.Pa. Oct. 17, 2002) (holding that although plaintiff "is 75 years old and experiences difficulty in traveling, this inconvenience is not severe enough to demonstrate that litigating in Florida will 'be so manifestly and gravely inconvenient' for her that she will be deprived her day in court."); *Falcone v. Mediterranean Shipping Co.*, 2002 WL 32348270 (E.D.Pa. Apr. 3, 2002) (holding that Italy is not so inconvenient a forum as to justify invalidation of a forum selection clause); *Drucker's, Inc. v. Pioneer Electronics (USA), Inc.*, 1993 WL 431162 (D.N.J. Oct. 20, 1993) (holding that dismissal with leave to commence action in California is not so onerous as to justify invalidating forum selection clause).

IV. CONCLUSION

For the foregoing reasons, and those set forth in Google's pleadings and argument in support of its Motion to Dismiss, the Court should enforce the parties' agreement and dismiss this action without prejudice, to allow it to proceed in forum specified in the contract.

Respectfully submitted,

LINDY & ASSOCIATES, P.C.

By: **_/s/ Jeffrey M. Lindy__**
Jeffrey M. Lindy, Esquire
David J. Berney, Esquire,
Of Counsel
1800 JFK Boulevard
Suite 1500
Philadelphia, PA 19103
215.575.9290

Attorneys for defendant,
Google, Inc.

Dated: January 8, 2007